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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. [redacted] 189

CHARLES I. LICHTENSTEIN, a/k/a CHARLES WELLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the above named petitioner for a writ of certiorari to review the Judgment of the Court of Appeals for the Fifth Circuit entered February 23, 1965, affirming the Judgment of Conviction for violation of Section 371, Title 18, United States Code entered in the United States District Court, for the Southern District of Florida, June 27, 1963, after a trial before Judge Bryan Simpson, without a jury, and from the Order of the Court of Appeals of the United States for the Fifth Circuit, denying the Petition for a Rehearing entered April 9, 1965, respectfully shows to this Honorable Court:

Opinions Below

The statement of the District Court at the close of the trial is set forth in page 420 of the Transcript of the Record.

The opinion of the United States Court of Appeals for the Fifth Circuit is appended to this petition as Appendix I.

The Order of the United States Court of Appeals, affirming the judgment of conviction is printed in Appendix II.

The Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for a rehearing of the appeal is printed in Appendix III.

Basis of Jurisdiction of Court of First Instance

The basis for federal jurisdiction in the court of first instance, asserted by the respondent, is by way of indictment under United States Code, Title 18, Section 371, and is set forth in length in the Transcript of the Record, pages 1-8, inclusive.

Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked

The date of the judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed and the date of its entry are February 23, 1965. A motion for a rehearing was filed March 31, 1965, and was denied by Order dated April 9, 1965, and was entered April 9, 1965.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 of the United States Code, Section 1254(1). Rule 19 of the Revised Rules of this Court is applicable.

Questions Presented for Review

1. Whether the Court of Appeals erred in holding that the failure of the petitioner to take the witness stand at his trial and deny having done the acts that are alleged as the overt act under the Conspiracy may be used against him and constitute an admission of guilt of the commission of the crime of Conspiracy, as alleged in the Indictment.

2. Whether the conspiracy as alleged in the Indictment ended with the arrest of the defendants Isaac B. Penso and Harry Kaflin.

3. Whether the Court of Appeals erred in upholding the District Court's denial of the motion to dismiss the indictment upon the ground that the Government failed to adduce evidence to establish the guilt of the petitioner beyond a reasonable doubt, upon the charge of violation of Title 18, Section 371, United States Code (Conspiracy).

Constitutional Provisions, and Statutes Which the Case Involves

The Fifth Amendment to the Constitution of the United States provides (Pertinent Part):

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *,"

United States Code, Title 18, Section 371, reads:

> "CHAPTER 19—CONSPIRACY
>
> § 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

United States Code, Title 18, Section 1084:

"§ 1084. Transmission of wagering information; penalties.

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wages on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub. L. 87—216, § 2, Sept. 13, 1961, 75 Stat. 491."

United States Code, Title 18, Section 2:

"§ 2. Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Statement of Case

Petitioner was tried in the District Court of the United States, Southern District of Florida, without a jury, before Judge Bryan Simpson, upon an indictment, charging Conspiracy (Count 1) and the substantive crime of Engaging in the Business of betting and wagering, and did knowingly use and cause to be used a wire communication facility of the Western Union Telegraph Company for the transmission in interstate commerce from Tampa, Florida, to New York, New York, of a wire communication which entitled the recipient to receive money as a result of bets and wagers on horse races, in violation of Title 18, United States Code, Sections 1084 and 2 (Count 7 of the Indictment).

Upon the Conspiracy Count (Count 1) petitioner was tried together with Isaac B. Penso and Harry Kaflin. Upon the substantive count (Count 7) petitioner was tried alone, although the indictment charges that a defendant named Ed Reid, also known as Red Reid committed the crime alleged in the seventh count, together with petitioner.

Petitioner was acquitted of the crime alleged in Count Seven of the Indictment (T. of R., pp. 419, 420).*

Petitioner was found guilty of the crime of Conspiracy (Count 1) together with a co-defendant, Isaac B. Penso.

Petitioner was sentenced to two years imprisonment.

Petitioner was arrested by agents of the F.B.I. in New York City, at the office of the Western Union, May 14, 1962, at about the hour of between 4 and 5 o'clock P.M. (T. of R., p. 334) when he signed for a Western Union Money Order Telegram in the amount of $25.00. Agent Francis E. Dwyer testified that he arrested petitioner; that a communication had been received from the Tampa office of the F.B.I. to New York stating that there was

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* T. of R. refers to transcript of record.

a Federal warrant out for Mr. Charles Wells who was to pick up a Western Union Money Order at 2114 Broadway, New York.

Petitioner pleaded not guilty to each count of the Indictment (T. of R., p. 429).

Upon the trial of petitioner, the first mention of petitioner appears from the testimony of John W. Henagan (T. of R., pp. 73, 74). Henagan testified that he never had any dealings with anybody known as Charles Wells (T. of R., pp. 76, 77). Henagan testified that he wired the $25.00 after the arrest of Penso and Kaflin (T. of R., p. 77). On direct examination Henagan testified that he received two phone calls from Charles Wells after the arrest of Penso and Kaflin (T. of R., p. 78). This testimony of Henagan is incorrect, as will be seen from the examination of Henagan by the Court (T. of R., pp. 80-81); and on further direct examination Henagan testified (T. of R., p. 83):

> "Q. Had you had any discussion about money before that? A. Only with Reid over the telephone."

Also, on cross-examination, Henagan testified that he had never spoken to Wells; that he had never seen Wells; that Wells had never spoken to him (Henagan); that Wells had never sent him (Henagan) any message, directly or indirectly (T. of R., pp. 105, 106).

Summarizing the testimony adduced upon the trial as against the petitioner upon the Conspiracy Count of the Indictment, we have the testimony of the witness Henagan. Henagan testified that the only time he had heard the name Wells was when Reid, or the person alleged to be Reid, told him to wire the money to Wells; that it was after Penso and Kaflin had been arrested that he went to the United States Attorney's office and that a man from that office took him to the Western Union office in Tampa and told him to wire Wells $25.00.

The testimony of the witness Henagan was not received in evidence, nor was Government Exhibit #5, for identification received in evidence upon the Conspiracy Count. It was only received in evidence under the substantive Count (Count 7) (T. of R., pp. 81, 82; 150). Government's Exhibit #5, for Identification is the Money Order Telegram transmitting $25 to Charles Wells (T. of R., pp. 144, 145).

The Court received in evidence under the Conspiracy Count the testimony of F.B.I. Agent Dwyer (T. of R., pp. 319, 320); the Court also received in evidence Government Exhibits for Identification, #21, #22, #23, #24 as against petitioner (T. of R., p. 396).

Opinion of Court of Appeals

In the *Per Curiam* opinion of the Court of Appeals that Court states:

> "Appellant does not deny having done the acts that are alleged as the overt act under the conspiracy."

It is clear that the Court of Appeals, from the above statement in the *Per Curiam* opinion, found that it was incumbent upon petitioner to become a witness upon the trial and testify concerning the acts alleged in the overt act.

The only overt act alleged in the Conspiracy Count is Overt Act #8, and this reads as follows:

> "8. On or about May 14, 1962, CHARLES I. LICHTENSTEIN, also known as CHARLES WELLS, did enter an office of the Western Union Telegraph Company at 2114 Broadway in New York, New York, and did sign a receipt for a Western Union money order and accept the money conveyed thereby."

One of the means and method by which the unlawful conspiracy was to be accomplished, with respect to petitioner, is alleged in the Indictment and marked paragraph 2. This reads:

> "It was a further part of said conspiracy that defendant CHARLES I. LICHTENSTEIN, also known as CHARLES WELLS, would go to an office of the Western Union Telegraph Company in New York, New York and accept money transmitted by wire communication from Tampa, Florida as a result of bets and wagers on horse races."

The testimony adduced upon the trial of petitioner establishes, without contradiction, that the witness Henagan, after the arrest of the co-defendants Penso and Kaflin, went to the United States Attorney's office; that some man from that office took him to the Western Union office in Tampa and told him to wire $25 to petitioner (T. of R., pp. 108; 147-148).

The Transcript of the Record establishes that the witness Henagan never intended to wire any money to petitioner; that Henagan only wired $25 to petitioner after he had visited the United States Attorney's office and some man from that office took him to the Western Union office in Tampa; told him to send $25 and told him what to put in the telegram (T. of R., pp. 147, 148, 151).

There is no language set forth in the overt act (Overt Act #8) to indicate that the money ($25.00) conveyed by the telegraph wires of the Western Union was accepted by the petitioner as money received by him as the result of a bet or wager made by the witness Henagan with Ed Reid.

In fact, the testimony of the witness Henagan is that he never intended to wire any money to either Ed Reid or petitioner as a result of bets or wagers on horse races

(as alleged in the Conspiracy Count of the Indictment; Paragraph #2, p. 3, T. of R.). The witness Henagan testified that he was instructed by someone from the United States Attorney's Office to wire petitioner $25.00 (T. of R., p. 151).

Argument Relied Upon for the Allowance of the Writ

The Court of Appeals for the Fifth Circuit has decided questions that are in conflict with the decisions of this Court.

POINT I

Petitioner, by his plea of not guilty, denied each and every allegation of the indictment.

The Court of Appeals held that it was incumbent upon petitioner to deny at the trial having done the acts that are alleged in the overt act under the Conspiracy Count. (Opinion of Court of Appeals; Appendix I.)

This can mean only one thing. This means that because the petitioner did not testify as a witness at his trial in his own behalf and deny having received the $25 in the office of the Western Union Telegraph Company in New York, with any knowledge that such money was being received by him as a result of bets or wagers made in interstate commerce, that this failure of petitioner to so testify, established his guilt of the crime of Conspiracy, as alleged in Count 1 of the Indictment.

The only inference that can be drawn from the language used by the Court of Appeals is that because the petitioner did not take the witness stand and testify that such failure to testify justifies an inference of guilt of the Conspiracy charge under the first count of the Indictment.

This clearly violates the Fifth Amendment of the Constitution of the United States. The Fifth Amendment of

the Constitution of the United States reads (Pertinent part):

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall be compelled in any criminal case to be a witness against himself, * * *"

The law is clear that when a defendant in a criminal case enters a plea of not guilty to an indictment that such plea of not guilty is a denial of the charges contained in such indictment. Petitioner did plead Not Guilty to the Indictment (T. of R., p. 429). (See *Griffen, Petitioner* v. *State of California,* Not Officially reported; 33 Law Week, p. 4382.)

The Court of Appeals completely overlooked the fact that petitioner was acquitted of the crime charged in Count Seven. By such acquittal, it became the law of this case that petitioner did not receive the $25.00 sent by wire on May 14, 1962 from Tampa, Florida to New York, New York, as a result of money bet or wagered upon horse races. It therefore follows that petitioner could not be guilty of committing the Overt Act #8 alleged in the Indictment on the Conspiracy Count. This Overt Act must be read in conjunction with the allegation in the Conspiracy Count that sets forth the means and method by which the conspiracy was to be accomplished. The means and method by which the conspiracy was to be accomplished with respect to petitioner is that petitioner would go to an office of the Western Union Telegraph Company in New York, New York and accept money transmitted by wire communication from Tampa, Florida as a result of said bets and wagers on horse races (See T. of R., pp. 2-3).

The evidence adduced by the Government establishes without contradiction that petitioner did receive $25.00 at the office of the Western Union in New York. But, by the acquittal of petitioner upon Count Seven of the Indict-

ment, it necessarily follows that the petitioner did not receive the $25.00 as a result of bets and wagers upon horse races in interstate commerce.

POINT II

The conspiracy came to an end with the arrest of the co-defendants Penso and Kaflin.

The evidence establishes that the co-defendants, Penso and Kaflin, were both arrested at about the hour of 12:00 noon on May 14, 1962.

Up to the time of the arrest of the co-defendants Penso and Kaflin, there is no evidence adduced by the Government that petitioner was a member of the conspiracy and acted in concert with, or aided and abetted, the co-defendants, Ed Reid, a/k/a Red Reid, Isaac B. Penso and Harry Kaflin.

In fact, the Trial Court, sitting as a jury, made a finding of fact which is very pertinent as follows (T. of R., pp. 419, 420):

> "The Court: • • • The same observations generally apply as far as Mr. Wells is concerned under Count Seven. It's charged that the Wire Statute, 1084, the Wire Communication Statute, 1084, and Section 2, were both violated. It clearly intends there, it seems to me, to charge Wells as aiding and abetting Reid. Except under the name of Reid, there is no proof of engaging in the business of betting and wagering, as far as Wells is concerned; unless you say that Wells, under the name of Reid, engaged in betting and wagering and used the wire communication facility, there is no proof of such activity on Wells' part. There is proof about Wells going and the money being wired to Wells and Wells going there and picking it up, which would be in aid or as an

> aider and abettor, or something of that sort of Reid. It seems to me that neither Count Six nor Count Seven make out—there is no case made out under Six or Seven as to either of the three Defendants here on trial and, therefore, Mr. Wells is acquitted under Count Seven."

In rendering this verdict, the Court, sitting as a jury, used testimony that was received in evidence only upon the substantive count (Count Seven) in the indictment.

The acquittal of petitioner of the crime alleged in Count Seven of the Indictment made it the law of this case, that petitioner, together with Ed Reid, also known as Red Reid, did not knowingly use and cause to be used a wire communication facility of the Western Union Telegraph Company for the transmission in interstate commerce, from Tampa, Florida, to New York, New York, of a wire communication which entitled the recipient to receive money as a result of bets and wagers on horse races on or about May 14, 1962.

The Trial Court, sitting as a Jury did say:

> "There is proof about Wells going and the money being wired to Wells and Wells going there and picking it up, which would be in aid or as an aider or abettor, or something of that sort of Reid. * * *"

so that it could be said, without question, that the Court, sitting as a Jury did deliberate about the evidence of petitioner receiving the money on May 14, 1962. Nevertheless, by the verdict of not guilty, that is evidenced by the acquittal of petitioner upon Count Seven of the Indictment, the Court must have found as a fact that petitioner did not receive this money as a result of bets and wagers on horse races, as alleged in the Indictment.

The Trial Court, sitting as a Jury, engaged in speculation that perhaps the co-defendant Ed Reid was petitioner

who used the name of Ed Reid and engaged in betting and wagering, but then stated: "* * * there is no proof of such activity on Wells' part". (T. of R., pp. 419, 420).

Coming back to the question as to whether the Conspiracy as alleged in the indictment came to an end with the arrest of Penso and Kaflin, an examination of the evidence adduced upon the Conspiracy Count will reveal that up to the time of such arrest the only testimony concerning petitioner was adduced by the testimony of Henagan.

The witness, John W. Henegan, called by the Government, testified that he never knew the appellant, never saw him, and never spoke to him.

Upon cross-examination the witness Henegan testified (T. of R., pp. 105, 106):

"By Mr. Pierce:

Q. Doctor, do you know Charles Wells? A. No, sir.

Q. So far as you know, have you ever seen Charles Wells? A. No, sir.

Q. So far as you know, have you ever spoken to Charles Wells in your life? A. No, sir.

Q. So far as you know, has Charles W. Wells ever spoken to you in his life or your life? A. Not that I know of.

Q. So far as you know, has Charles W. Wells ever sent you any message directly, or indirectly from him? A. No.

Q. Now then, prior to or, rather, up to the time of the arrest of Mr. Penso in your veterinarian's place of business in Tampa, on May 14, 1962, I believe it was, about noon of that day, up to that time had you ever heard the name of Charles W. Wells, in any way, shape, manner or form, except as you say, when Mr. Reid mentioned his name to you over the telephone? A. That's the only time I heard it.

Q. Now, didn't— First, I'll ask you: Do you know who Mr. Reid was? A. No, except that—

Q. Or at this time, do you know who he is? A. No, I don't know. I wouldn't know, if I saw him, no.

Q. Have you ever seen Mr. Reid? A. No."

Upon further cross-examination the witness Henegan testified (T. of R. p. 107):

"Q. Now, I believe you said that the only time you ever heard the name Charles W. Wells mentioned to you in any way, shape or form was when the man who gave you the name of Reid or 17 told you to wire the money to Charles W. Wells? A. Yeah, I think he mentioned it twice, but that's the only time I ever heard it was when it was mentioned by him."

The aforesaid testimony of the witness Henegan establishes that petitioner was never known to the witness Henegan; that the witness Henegan never had any dealings with the petitioner; had never spoken to him over the telephone.

It is important, at this point to set out verbatim the overt act, and the only overt act respecting this petitioner, alleged in the Conspiracy Count of the indictment, Overt Act, No. 8 (T. of R. p. 5):

"8. On or about May 14, 1962, Charles I. Lichtenstein, also known as Charles Wells, did enter an office of the Western Union Telegraph Company at 211 Broadway in New York, New York, and did sign a receipt for a Western Union money order and accept the money conveyed thereby."

It is also important to note that when the witness Henegan testified as to the sending of the money, his testimony establishes that the money ($25.00) was sent by a plan arranged by a person connected with the office of the

United States Attorney, and, not identified by name. This testimony was adduced upon a *voir dire* examination of the witness Henegan. The witness Henegan testified (T. of R., pp. 74-82):

(At p. 74)

"By Mr. Pierce:

Q. When was it that you—where did that take place, where you wired him the $25.00? A. The 14th of May.

Q. The 14th of May? A. Yes, sir.

Mr. Pierce: Now, if your Honor please, we move to strike that testimony because it was after the conspiracy, if—after the conspiracy, if any ever existed, was over."

* * * * * *

(At p. 75)

"The Court: That hasn't come out yet.

Mr. Pierce: Well then, I would like to develop it further than by questioning, Judge.

By Mr. Pierce:

Q. Was it after the arrest, any arrests were made at your place of business, Dr. Henegan? A. Yes, sir, they were arrested about 12:00 o'clock and I wired the money about 4:00, I think.

Q. The same day? A. The same day, yes, sir."

* * * * * *

(At p. 77)

"Q. My question was, had you had any dealings or conversations— A. With Charles Wells? No, sir.

Q. —directly or indirectly with Charles Wells? A. No, sir.

Q. Yes, sir. And it was after that time, after the arrests of Penso and Kalfin were made at your place, at your office in Tampa? A. That's correct, sir.

Q. On that day, it was after that, it was after that several hours when you sent the money to New York? A. That's correct.

Q. To Charles Wells? A. Yes."

At page 79, it will appear that the United States Attorney made the following statement to the Court:

"Mr. Hanlon: Now, your Honor, with respect to this, it is our contention that this conspiracy was not interrupted by reason of these two defendants, Penso and Kalfin, arrest, that it was still continuing, that he was getting 'phone calls to wire the money, 'phone calls to see if these people had come by his office, and that, therefore, the conspiracy was continuing even after they were arrested.

Now, I recognize that as a basic proposition an arrest does generally interrupt a conspiracy, but there are unusual circumstances where it does not, and I submit that where two people have been arrested, refuse to tell with whom they're in—

Mr. Varon: Your Honor, excuse me for interrupting, but, if counsel is going to start making his own evaluation of this case and say things in the record here that the doctor didn't say on the stand, I would ask to have the doctor excused.

The Court: Well, I think we can do without it. I'm going to receive this testimony. It would seem to me that it at least goes to the Seventh Count, the substantive count, which names Wells and Reid, and it may, if connected, go to the conspiracy count. I don't know, I can't say yet whether it should be considered under the conspiracy count or not but I want to ask him one thing:"

* * * * * *

(At pp. 81, 82):

"The Court: Well, this thing seems to come in without very much chronology or continuity to me but, at any rate, I won't take your witness over. I'll give your witness back to you and I'll receive this. I'm going to consider his testimony about the $25.00 being wired to Wells. It is not stricken from the record at this point. I consider that certainly it may be held in the record as to the Fifth—I mean the Seventh Count. It may, depending on what the additional proof is, it may be proper to consider it under the conspiracy count; I don't know.

Mr. Pierce: You're not making any final ruling now then, as to the First Count?

The Court: As to the conspiracy count, I'm leaving it open. It does seem to me that it should come in under Seven, because it's the transactiion that's described in Seven, or a portion of it."

The petitioner respectfully calls to the attention of this Court that again the Trial Court, sitting as a Judge on the Law, made a ruling with respect to the evidence concerning him.

In the direct examination by the United States Attorney of the witness, Henegan, concerning a wire sent to Charles Wells in the amount of $25.00 on May 14, 1962 at about the hour of 4.00 o'clock P.M. (after the arrest of the co-defendants Penso and Kaflin) that had been previously marked "Government's Exhibit #5 for identification, the United States Attorney offered in evidence Government's Exhibit #5 for identification.

On the *voir dire* examination conducted by Mr. Varon, one of petitioner's attorneys, such examination developed that the witness, Henegan, went to the office of the United States Attorney, and, from there went to the Western Union Office, in company with a person from the United

States Attorney's Office, whose name was not disclosed; that this person told Henegan what to write in the telegram (see T. of R., pp. 147, 148).

It was further developed upon the *voir dire* examination of the witness Henegan that the person from the United States Attorney's Office instructed the witness Henegan to send the money order telegram for $25.00 to the appellant (see T. of R., p. 151).

The appellant urges that this conclusively establishes that the conspiracy was at an end when the co-defendants Penso and Kalfin were arrested.

It is important to note here that the conspiracy count of the Indictment alleges (see p. 3, T. of R.).

> 2. It was a further part of said conspiracy that defendant Charles I. Lichtenstein, also known as Charles Wells, would go to an office of the Western Union Telegraph Company in New York, New York and accept money transmitted by wire communication from Tampa, Florida as a result of said bets and wagers on horse races.

The Indictment alleges that the aforesaid was the method and means by which the unlawful conspiracy was to be accomplished.

Leaving for a moment appellant's contention that this testimony was never admitted in evidence, appellant urges that the testimony of the witness Henegan establishes that he did not send this money order telegram to the appellant in payment or part payment of any bet or wager made by him with the co-defendant Ed Reid, a/k/a Red Reid. And, furthermore, the acquittal of petitioner by the Trial Court, sitting as a jury, on Count Seven of the Indictment establishes as a matter of law that petitioner did not accept the money transmitted by wire communication in New York, New York, as a result of bets or wagers on horse races, as alleged in the Conspiracy Count (Count One) of

the Indictment. The Conspiracy Count alleges that the method and means by which the unlawful conspiracy was to be accomplished is that money wired by Western Union from Tampa, Florida to New York, New York, was accepted by petitioner, as a result of bets and wagers on race horses. There is no question that the money wired by the witness Henegan while in the company of a person from the United States Attorney's office from Tampa, Florida, was accepted by the petitioner. But the Trial Court, sitting as a jury, having acquitted the petitioner of the charges contained in Count Seven of the Indictment, made it the law of this case, that the petitioner did not knowingly use and cause to be used a wire communication facility for the transmission in interstate commerce from Tampa, Florida to New York, New York, of a wire communication which entitled petitioner to receive money as a result of bets and wagers on race horses.

It was incumbent upon the United State Government to establish every material allegation of the Conspiracy Count.

The United States Government did not prove, beyond a reasonable doubt, that petitioner did accept money transmitted by wire communication from Tampa, Florida as a result of bets and wagers on race horses, as alleged in the Indictment in the Conspiracy Count (T. of R., p. 3, paragraph #2).

With respect to petitioner, up to the time of the arrest of Penso and Kaflin, the only evidence adduced by the Government with respect to petitioner is that of the witness Henagan who testified that the co-defendant Ed Reid told him over the telephone, after the arrest of Penso and Kaflin, to send the money owed by Henagan to Ed Reid to petitioner, using the name of Charles Wells.

It is important, at this point, to call the attention of this Court to the fact, that upon the Conspiracy Count, the testimony of the witness Henagan, with respect to the

sending of the money order telegram to petitioner, and Government's Exhibit #5, for identification, the money order telegram in the sum of $25.00 sent by the witness Henagan, after the arrest of the co-defendants, Penso and Kaflin, at the direction of some person connected with the United States Attorney's office to petitioner was never received in evidence.

The Transcript of Record establishes this without any contradiction and reference is made to that record, page 150, where the Court said:

> "The Court: Well, its receipt with respect to the conspiracy count is reserved. I'm receiving it as to Seven and reserving. There may be evidence in a conspiracy case, as Mr. Hanlon has pointed out this morning, after an arrest. For instance, you often see a case where a liquor place or dope place or numbers place is raided and the people wait in there and catch the other members as they come in, and somebody may go on and perform the acts in furtherance of the conspiracy after some conspirators are arrested.
>
> I prefer to consider whether or not this evidence will be considered in connection with the conspiracy charge after all the conspiracy evidence is in. I am taking it now as to seven."

Nowhere in the Transcript of Record does it appear that the Court ever did receive in evidence any testimony adduced with respect to the Conspiracy Count. This cannot be left to surmise.

When the Trial Court stated that this testimony was admitted in evidence only with respect to the substantive count (Count Seven) this was a ruling made by the Judge passing upon a question of law, and in effect, he was telling the jury (in this case, the Judge sitting as a jury) that such evidence cannot be considered in any deliberations that are to be had on the questions of fact, with respect to the Conspiracy Count.

The petitioner urges that if the Judge, sitting as a judge on questions of law, now at the close of the case, desired to rule on the admissibility of the testimony adduced by the United States Attorney with respect to the Conspiracy Count of the indictment, and did affirmatively rule that such testimony is received as evidence to establish the Conspiracy Count of the indictment, then, and only then, would such testimony be received in evidence, and after such testimony has been received in evidence, then the jury (in this case, the Judge sitting as a jury) would be permitted to deliberate upon this evidence with respect to the Conspiracy Count, and arrive at a verdict.

It therefore follows that the only evidence adduced upon the trial with respect to the Conspiracy Count up to the time of the arrest of Penso and Kaflin is that of the witness Henagan of the two telephone conversations he had with the co-defendant Reid with reference to sending the money to petitioner (T. of R., p. 107).

There is evidence adduced by the Goverment that petitioner did receive the $25.00 in the office of the Western Union in New York, but, as heretofore stated, the receipt of such money was not knowingly received by petitioner as a result of bets and wagers on horse races, and this is the law of this case as evidenced by the acquittal of petitioner upon Count Seven of the Indictment.

Careful consideration of the aforesaid evidence establishes that the Goverment did not adduce any evidence up to the time of the arrest of Penso and Kaflin, to connect petitioner in any manner with the Conspiracy alleged in the Indictment.

In *Jones* v. *United States,* 10 Cir. 251 F. 2d 288, 293, the Court said:

> "A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits

some act in furtherance thereof United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128; Laska v. United States, 10 Cir. 82 F. 2d 672, certiorari denied 298 U. S. 689, 56 S. Ct. 957, 80 L. Ed. 1407; Skelly v. United States, 10 Cir. 76 F. 2d 483, certiorari denied 295 U. S. 757, 55 S. Ct. 914, 79 L. Ed. 1699; Booth v. United States, 10 Cir. 57 F. 2d 192. This knowledge may be inferred from the circumstances, acts and conduct of the parties."

In *Fiswick, et al.* v. *United States,* 329 U. S. 211, 216, this Court said:

"Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See United States v. Irvine, supra. Continuity of action to produce the unlawful result, or as stated in United States v. Kissel, supra, p. 607; 'continuous cooperation of the conspirators to keep it up' is necessary. A conspiracy is a partnership in crime. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 253. Under Section 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to complete the offense." (*United States* v. *Irvine,* 98 U. S. 450; *United States* v. *Kissel,* 218 U. S. 601).

POINT III

The Government failed to adduce any evidence to establish the guilt of petitioner beyond a reasonable doubt.

It is important to note precisely just what the Conspiracy Count of the Indictment charges. This Count charges (1) that Ed Reid, a/k/a Red Reid, Isaac B. Penso, Harry Kaflin and Charles I. Lichtenstein, a/k/a Charles Wells conspired, combined, confederated and agreed together and with each other, unlawfully, wilfully and know-

ingly, to use a wire communication facility, to wit: the telephone, while engaged in the business of betting and wagering, for transmission in interstate commerce, to wit: from Tampa, Florida to New York, New York, of bets and wagers on race horses, in violation of Title 18, U.S.C. Section 1084.

The evidence establishes that the only person with whom the witness, Henagan, communicated with was the co-defendant Ed Reid, who was not tried.

With respect to the above allegation of the Conspiracy Count there is not a scintilla of evidence adduced by the Government to establish that petitioner ever spoke to Henagan; ever had any conversations with Henagan; or had any dealings of any kind with the witness Henagan. There is not a scintilla of evidence to establish that petitioner had any knowledge that the co-defendant, Ed Reid, was engaged in accepting bets or wagers upon race horses in interstate commerce.

With respect to paragraph #2 of the indictment there is not a scintilla of evidence to establish that petitioner used a telephonic communication system between New York, New York and Tampa, Florida; nor is there a scintilla of evidence to establish that petitioner had any knowledge that the co-defendant Ed Reid was using a telephonic communication system as above set forth.

With respect to paragraph #3 of the Indictment, there is not a scintilla of evidence to establish that petitioner knowingly used a wire communication facility of the Western Union Telegraph Company, while engaged in the business of betting and wagering, for the transmission in interstate commerce, from Tampa, Florida to New York, New York, of a wire communication entitling the recipient (petitioner) to receive money as a result of bets and wagers on horse races, in violation of Title 18, U.S.C. Section 1084. In fact, petitioner was acquitted by the Trial Court

(sitting as a jury) of being engaged in the business, together with Ed Reid (a co-defendant) of betting and wagering, and knowingly using and causing to be used a wire communication facility of the Western Union Telegraph Company for the transmission in interstate commerce from Tampa, Florida, to New York, New York, of a wire communication which entitled the recipient (petitioner) to receive money as a result of bets and wagers on race horses.

The language used in paragraph #3, is precisely the same as that used in Count Seven of this indictment.

It certainly cannot be said that the evidence adduced upon the trial established that petitioner did the acts set forth in paragraph #3 of the Conspiracy Count of the Indictment, and, then say that petitioner did not do the acts set forth in Count Seven of the Indictment.

The Transcript of Record establishes that the Trial Court (sitting as a Jury) acquitted petitioner upon Count Seven before any verdict was returned upon the Conspiracy Count of the Indictment (T. of R. pp. 419, 420).

The Indictment further charges that the means and methods by which the unlawful conspiracy was to be accomplished. The Indictment sets forth in paragraph #2 (T. of R. p. 3) that the means and the methods by which petitioner accomplished the unlawful conspiracy is that petitioner would go to an office of the Western Union Telegraph Company in New York, New York and accept money transmitted by wire communication from Tampa, Florida as a result of bets and wagers on horse races.

With respect to this allegation we again come back to the acquittal of petitioner of the charges contained in Count Seven of the Indictment. The evidence in the Transcript of Record establishes that petitioner did accept the $25 in the office of the Western Union in New York, New York (T. of R. p. 325). But, by the verdict of not guilty of Count

Seven, the Trial Court, sitting as a jury, found that petitioner did not receive this money as a result of bets and wagers on horse races.

We now come to the Overt Acts set forth in the Indictment. The only Overt Act set forth in the Indictment that names petitioner is Overt Act #8 (T. of R. p. 5).

The Government did not prove this Overt Act. It is true that petitioner did sign a receipt for a Western Union money order and did accept the money conveyed thereby. But this Overt Act must be read together with the method and means by which the unlawful conspiracy was to be accomplished. When the Trial Court, sitting as a jury, acquitted the petitioner of the charges contained in Count Seven of the Indictment this means that petitioner was not engaged in the business of betting and wagering; that petitioner did not knowingly use and cause to be used a wire communication facility of the Western Union Telegraph Company for the transmission in interstate commerce of a wire communication which entitled the recipient to receive money as a result of bets and wagers on horse races. And, further, that petitioner did not go to an office of the Western Union Telegraph Company in New York, New York and accept money transmitted by wire communication from Tampa, Florida as a result of bets and wagers on horse races.

It is true that the Trial Court, before rendering the verdict of Guilty as charged in Count One, the Conspiracy Count, did say:

> "Now, as to the Conspiracy Count, I consider the proof ample that there was a conspiracy in existence, as described in Count One, that the Defendant Isaac B. Penso, was a party to that conspiracy and that the Defendant, Charles Wells, was a party to that conspiracy; that that conspiracy had one or more of the unlawful objects set out in the Count, and that during the existence of the conspiracy that one or

more of the Overt Acts were committed in furtherance of the conspiracy by one or more of the Defendants named.

Overt Act No. 4 is proved.
Overt Act No. 6 is proved.
Overt Act No. 8 is proved.

First, what evidence was adduced to establish that petitioner was a party to the Conspiracy?

The answer is that there is no evidence to establish that petitioner was a party to the Conspiracy. This is established by the acquittal of petitioner of the crime charged in Count Seven. Count Seven charges that petitioner was engaged in the business of betting and wagering and that he did knowingly use and cause to be used a wire communication facility of the Western Union Telegraph Company in interstate commerce.

It therefore follows that paragraphs #1, #2 and #3 of the Conspiracy Count of the Indictment (T. of R. pp. 1, 2) were not proven.

We now come to the means and methods by which the unlawful conspiracy was to be accomplished (T. of R. pp. 2, 3).

Paragraph #2 (T. of R. p. 3), was not proven. The acquittal of petitioner of the crime charged in Count Seven established that petitioner did not accept money transmitted by wire communication from Tampa, Florida to New York, New York, as a result of bets and wagers on horse races.

Summarizing the aforesaid, it will be seen that there is no evidence, with respect to petitioner, to establish his guilt beyond a reasonable doubt upon the crime alleged in the Conspiracy Count.

Thus the conclusion that the Trial Court, sitting as a jury, arrived at based upon the deliberations upon the evi-

dence adduced with respect to the Conspiracy Count and the statement of the Trial Court:

> "* * * and that the Defendant, Charles Wells, was a party to that conspiracy; * * *"

is not borne out by any evidence adduced upon the trial.

The attention of this Court is respectfully called to the brief submitted by the United States Attorney upon the appeal to the Court of Appeals of the United States, for the Fifth Circuit. Under the heading "Statement of the Facts" the United States Attorney states (p. 3):

> "Dr. Henagan testified that pursuant to these directions (T. 68) he did send a $25.00 Western Union money order to Charles Wells, 2114 Broadway, New York City."

This is a misstatement of the facts as testified to by Dr. Henagan. Dr. Henagan did not testify that he sent the $25 pursuant to the telephone directions he had received from the defendant Ed Reid. Dr. Henagan testified that after he went to the office of the United States Attorney, some man from that office told him to send the $25.00 to petitioner; that this man went to the Western Union office with him and told him what to write down (T. of R. pp. 146-152).

Again at page 3 the United States Attorney states that Government's Exhibit #5 was received in evidence.

This is a misstatement. Government's Exhibit 5 was never received in evidence upon the Conspiracy Count (T. of R. p. 150). Government Exhibit #5 was received in evidence only as to Count Seven of the Indictment. Nowhere in the Transcript of Record does it appear that Government's Exhibit #5 was ever received in evidence with respect to the Conspiracy Count (Government Exhibit #5 is the Western Union application for a money order sending $25.00 to Charles Wells).

It further appears in the brief (p. 5) under "Argument" that the United States Attorney states:

> "Exhibit 5 corroborates Henagan's testimony as to his action in following directions of one Reid in telegraphing a sum of money in payment of wagering debts to the appellant outlining the code words furnished."

Here the United States Attorney relied upon Government Exhibit #5 as evidence in the case tried upon the Conspiracy Count when in fact Government Exhibit #5 was never received in evidence upon the Conspiracy Count.

Reason for Granting the Writ

The petitioner before trial waived a trial by jury and also the right to have the Court, sitting without a jury, make special findings of fact, and the Court stated that it would make a general verdict of guilty or not guilty just as though the Court was the jury (T. of R. pp. 30-31).

Thus the Court, sitting as a jury, returned a verdict of not guilty with respect to petitioner of Count Seven of the Indictment.

The trial was conducted with respect to all the counts of the Indictment, and the acquittal of petitioner upon the charges contained in Count Seven of the Indictment made it the law of this case that petitioner was not engaged in betting and wagering; that petitioner did not knowingly use and cause to be used a wire communication of the Western Union Telegraph Company for the transmission in interstate commerce, from Tampa, Florida to New York, New York, of a wire communication which entitled the recipient (petitioner) to receive money as a result of bets and wagers on horse races.

It therefore follows that if petitioner was not guilty of engaging in betting and wagering; of knowingly using and

causing to be used a wire communication of the Western Union Telegraph Company for the transmission in interstate commerce, from Tampa, Florida to New York, New York, of a wire communication which entitled petitioner to receive money as a result of bets and wagers upon horse races, then petitioner must be not guilty of I. Knowingly using a wire communication to wit: the telephone, while engaged in the business of betting and wagering, for transmission in interstate commerce, to wit: from Tampa, Florida to New York, New York, of bets and wagers on horse races in violation of Title 18, United States Code, Section 1084. Count Seven of the Indictment charges a violation of Title 18, United States Code, Section 1084 (also Section 2) (See T. of R. pp. 1, 2; Paragraph 1 of the Indictment).

It also follows that petitioner by reason of his acquittal upon the charges contained in Count Seven did not engage in the business enterprise involving gambling offenses as alleged in Paraghaph 2 of the Indictment (T. of R., p. 2).

It also follows that petitioner by reason of his acquittal upon the charges contained in Count Seven did not knowingly use a wire communication facility of the Western Union Telegraph Company, while engaged in the business of betting and wagering, for the transmission in interstate commerce, from Tampa, Florida to New York, New York, of a wire communication entitling petitioner to receive money as a result of bets and wagers on horse races, in violation of Title 18, United States Code, Section 1084, as alleged in Paragraph 3 of the Indictment (Tr. of R. p. 2).

It also follows that petitioner by reason of his acquittal upon the charges contained in Count Seven did not employ the means and methods as alleged in the Indictment of the Conspiracy Count by which the unlawful conspiracy was to be accomplished, to wit: go to the office of the Western Union Telegraph Company in New York, New York, and accept money transmitted by wire communication from

Tampa, Florida as a result of bets and wagers on horse races, as alleged in the Conspiracy Indictment (T. of R. p. 3, paragraph 2).

It also follows that petitioner by reason of his acquittal upon the charges contained in Count Seven did not commit the overt act as alleged in the Indictment. The Indictment alleges that petitioner is charged with committing the overt act (Overt Act #8) in furtherance of and for the purpose of carrying into execution the unlawful conspiracy as alleged in the indictment (See T. of R. p. 3; Overt Acts). However, while it is true that petitioner did accept the $25.00 in the office of the Western Union Telegraph Company in New York, New York, the Court, sitting as a jury, found petitioner not guilty of being engaged in the business of betting and wagering upon horse races, and, did find him not guilty of knowingly using and causing to be used a wire communication facility of the Western Union Telegraph Company in interstate commerce from Tampa, Florida to New York, New York of a wire communication which entitled petitioner to receive money as a result of bets and wagers.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Telephone PL 7-8671

Appendix I.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20686

CHARLES I. LICHTENSTEIN, a/k/a CHARLES WELLS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 23, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM: This appeal is pitched exclusively on the contention of appellant that the Government's case was established solely by circumstantial evidence and that such evidence "was wholly insufficient to convict, as it did not exclude, as it must, every other reasonable conclusion than that of guilt". Appellant does not deny having done the acts that are alleged as the overt act under thhe conspiracy. There was ample evidence of the existence of a conspiracy and of appellant's identification with the other alleged conspirators to warrant the finding by the trial court, sitting without a jury, that appellant was guilty beyond a reasonable doubt.

The judgment is AFFIRMED.

Appendix II.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 20686

D. C. DOCKET No. 8124-T-Cr.

CHARLES I. LICHTENSTEIN, a/k/a CHARLES WELLS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1965

Issued as Mandate:

Appendix III.

(411)—Tuttle

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20686

CHARLES I. LICHTENSTEIN, a/k/a CHARLES WELLS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 9, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

U. S. COURT OF APPEALS
FILED
Apr 9 1965
EDWARD W. WADSWORTH
Clerk